TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 332

FRANCIS I. DUPONT, EDMUND DUPONT, RHETT DUPONT, ET AL., ETC., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1936.

CERTIORARI GRANTED OCTOBER 19, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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vs.

THE UNITED STATES OF AMERICA

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANCIS I. DUPONT, EDMUND DUPONT, RHETT DUPONT, E. Paul DuPont, William A. Fine, Arthur F. Shettle, William A. Whitaker, Co-partners, Trading under the Firm Name and Style of Francis I. DuPont & Company, Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA, Defendant-Appellee

STATEMENT UNDER RULE 234

This action was commenced on June 10, 1935, by the filing of a petition. The answer was served on August 30, 1935, and filed on August 31, 1935.

Plaintiffs moved to strike out defendant's answer and for summary judgment, and defendant made a cross-motion to strike out plaintiff's petition and for summary judgment, both motions having been heard on October 15, 1935, before Judge Henry W. Goddard and decided on December 31, 1935, in favor of defendant.

The order appealed from striking out plaintiffs' petition and awarding judgment for the defendant was made on January 6, 1936, entered on January 7, 1936, and the judgment appealed from was entered January 16, 1936.

[fol. 2] The appeal herein was taken on January 23, 1936.

The names of the original parties are above set forth and there has been no change of parties since the commencement of the action.

Plaintiffs appear by Irving Mariash. Defendant appeared by F. W. H. Adams, who was succeeded by Lamar Hardy, United States Attorney.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

COMPLAINT

To the Honorable Justices of the District Court of the United States for the Southern District of New York:

Plaintiffs herein, by their attorney, Irving Mariash, Esq., as and for their petition herein, respectfully show and allege:

[fol. 3] 1. That the United States of America is a corporation sovereign created under the Constitution of the United States.

2. That the plaintiffs are co-partners trading under the firm name and style of Francis I. DuPont & Company, and having their office in the Southern District of New York.

3. The plaintiffs are in the business of cotton brokers trading on and as members of the New York Cotton Exchange.

4. Plaintiffs were acting as agents and brokers for certain principals, which principals were the owners of future delivery cotton contracts for the total amount of 24,100 bales of cotton.

5. That shortly prior to March 23, 1934, plaintiffs received instructions from its principals requesting plaintiffs as their agent and broker to transfer said contracts to other brokers, Messrs. Fenner & Beane, for the account of the same principals, so that Messrs. Fenner & Beane would act as agent and broker in place of plaintiffs.

6. That in compliance with these instructions, plaintiffs took the necessary steps to terminate their agency for the said principals and to transfer the cotton accounts referred to, to Fenner & Beane, as the new substituted brokers for these principals.

7. That in accordance with the rules of the New York Cotton Exchange and the New York Cotton Exchange

Clearing Association, such transfer is accomplished by entering these accounts totalling 24,100 bales as transfers [fol. 4] on plaintiff's sales sheets of March 23 and the receiving brokers, Fenner & Beane, entering the same on their purchase sheets as of the same day.

8. That after such transfer the same owners continued to own these cotton contracts as prior to the transfer.

9. That under the rules of the New York Cotton Exchange Clearing Association and the regulations of the Internal Revenue Department, at the end of each month, brokers must file monthly recapitulation sheets of the transactions occurring during the previous month and must affix thereto the proper amounts of future delivery Federal revenue stamps.

10. That on or about April 4, 1934, plaintiffs purchased $1,984.10 of such future delivery stamps from the Empire Trust Company at 120 Broadway, New York City, a designated sales agent of the Internal Revenue Department, affixed them to said recapitulation sheet and cancelled same.

11. That plaintiffs' transactions during the prior month other than the one herein referred to totalled $1,254.70.

12. That plaintiffs affixed stamps and cancelled the same in connection with the foregoing transaction in the additional sum of $729.40.

13. That said affixation and cancellation of said $729.40 in stamps was done erroneously and unnecessarily and as a result of mistake.

[fol. 5] 14. That the foregoing transfer is a non-taxable transaction.

15. That thereafter these contracts were liquidated for the same principals by the new brokers, Fenner & Beane.

16. That at said time the full tax was paid through Fenner & Beane and the full proper amount of future-delivery stamps, purchased, affixed and cancelled.

17. That immediately thereafter, on April 5, 1934, plaintiffs filed a claim for refund with the Collector of Internal Revenue for the Second District of New York in due and proper form.

18. That on June 12, 1934, said claim was rejected by the Commissioner of Internal Revenue.

19. That the Commissioner of Internal Revenue in rejecting said claim ruled that: "Inasmuch as these accounts are transferred by passing sales for future delivery through the Clearing House under the rules and usages applicable thereto, such contracts are subject to the stamp tax."

20. That the rule and determination of the Commissioner of Internal Revenue is in error.

21. That the plaintiffs duly applied for reconsideration of said claim and rehearing, which application was denied.

22. That there is now due and owing to plaintiffs from defendant the sum of $729.40 with interest from April 5, 1934, which sum defendant has failed to pay though duly demanded.

[fol. 6] Wherefore, plaintiffs pray for judgment against the defendant in the sum of $729.40 with interests and costs.

Dated, New York, June 7, 1935.

Irving Mariash, Attorney for Plaintiffs, Office and P. O. Address, 29 Broadway, Borough of Manhattan, City of New York.

(Verified by Francis I. DuPont, one of the partners in plaintiff firm, June 7, 1935.)

IN UNITED STATES DISTRICT COURT

ANSWER TO COMPLAINT

The defendant, by F. W. H. Adams, United States Attorney for the Southern District of New York, its attorney, for its answer to the complaint filed herein, respectfully shows the Court and alleges upon information and belief:

1. Admits the allegations in Paragraphs 1, 2, 3, 9, 18, 19 and 21 of the complaint.

2. Denies each and every allegation in Paragraph 4 of the complaint except the defendant admits that the plain-
[fol. 7] tiffs purchased 24,100 bales of cotton for future delivery for the account of certain of their customers.

3. Denies having any knowledge or information sufficient to form a belief as to each and every allegation in Paragraphs 5, 6, 8, 10, 11, 15 and 16 of the complaint, and therefore denies the same.

4. Denies each and every allegation in Paragraph 7 of the complaint except the defendant admits that on or about March 23, 1934, in accordance with the rules and usages of the New York Cotton Exchange, and the New York Cotton Exchange Clearing Association, plaintiffs undertook to and did sell and transfer the aforesaid 24,100 bales of cotton to Messrs. Fenner & Beane, brokers and members of the New York Cotton Exchange, and that said transaction was cleared through the New York Cotton Exchange Clearing Association in accordance with its by-laws, rules and usages, as a sale, and the plaintiffs and the said Fenner & Beane duly executed the usual form of sale and memorandum and recorded and reported the transaction as a sale, subject to payment of the documentary stamp tax under the provisions of Schedule A-4, Title VII of the Revenue Act of 1926.

5. Denies each and every allegation of Paragraph 12 of the complaint except the defendant admits that the plaintiffs paid the sum of $729.40 for the documentary stamp tax in connection with the aforesaid sale of said 24,100 bales of cotton for future delivery.

6. Denies each and every allegation in paragraphs 13, 14, 20 and 22 of the complaint.

[fol. 8] 7. Denies each and every allegation of Paragraph 17 of the complaint except the defendant admits that plaintiffs filed a claim for refund with the Collector of Internal Revenue for the Second District of New York on April 6, 1934.

Wherefore, defendant prays judgment against the plaintiffs dismissing the petition and for the costs and disbursements of this action.

F. W. H. Adams, United States Attorney for the Southern District of New York, Attorney for Defendant, U. S. Courts & P. O. Building, Borough of Manhattan, City of New York.

Duly sworn to by Elizabeth R. Horan. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

PLAINTIFFS' NOTICE OF MOTION FOR JUDGMENT

Please take notice that upon the annexed affidavits of Irving Mariash, Esq., duly verified September 27, 1935; John P. Collins, duly verified September 23, 1935; John P. Julian, duly verified September 23, 1935; and upon the petition herein, duly verified June 7, 1935; and the answer of the defendant, duly verified August 29, 1935, which are hereto annexed, a motion wil be made in the Motion Part of the United States District Court for the Southern District of New York, to be held in Room 235, United States Courts and Post Office Building, Borough of Manhattan, City of New York, on October 8, 1935, at 10:30 in the fore-[fol. 10] noon of that day, or as soon thereafter as counsel can be heard, for an order striking out said answer and directing that judgment for the amount demanded in the petition be entered in favor of the plaintiffs and against the defendant, together with the costs, disbursements and interest according to law, and for such other and further relief as may be just and proper.

Please take further notice that answering affidavits are required to be served at least five days before the return day of this motion.

Yours, etc., Irving Mariash, Attorney for Plaintiffs, Office and P. O. Address, 29 Broadway, Borough of Manhattan, City of New York.

To F. W. H. Adams, Esq., United States Attorney for the Southern District of New York, Attorney for Defendant, U. S. Courts and P. O. Building, Borough of Manhattan, City of New York.

[fol. 11] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF IRVING MARIASH IN SUPPORT OF PETITIONER'S MOTION

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Irving Mariash, being duly sworn, deposes and says:

That he is the attorney for the plaintiffs in this action and fully familiar with the facts thereof. That plaintiffs

have fully and fairly stated to your deponent the facts constituting this cause of action and your deponent has advised them and verily believes that they have a good and meritorious cause of action and that there is no defense thereto. Your deponent has discussed this with counsel for defendant and believes that there is solely a question of law involved which must be resolved in the favor of the plaintiffs.

No previous application for the relief herein prayed for has been made.

Wherefore, your deponent prays that summary judgment be granted in favor of the plaintiffs and against the defendant in the sum of $729.40, together with the costs, disbursements and interest in this action.

Irving Mariash.

Sworn to before me this 27th day of September, 1935. Mitchell Antman, Notary Public. Kings Co. Cl'k No. 143, Reg. No. 6148. N. Y. Co. Cl'k No. 384, Reg. No. 6A208. Commission expires March 30, 1936.

[fol. 12] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN P. COLLINS IN SUPPORT OF PETITIONER'S MOTION

STATE OF NEW YORK,
City of New York,
County of New York, ss:

John P. Collins, being duly sworn, deposes and says:

That at all times hereinafter mentioned I was and still am the manager of the Commodity Department of Francis I. DuPont & Company and am thoroughly familiar with the transactions herein referred to.

On March 23, 1934, we, as brokers, were carrying approximately 24,100 bales of cotton for the following principals who were the owners thereof:

J. P. Abney, Grendel Mills #1, Panola Mills, J. Richard Abney, H. J. Thayer, O. C. Spivey, J. Wm. Watson, Farmers Loan & Tr. Co. and A. Sidney Hartzog, all of Greenwood, South Carolina.

On that day Mr. J. P. Abney, who was acting on behalf of these owners, notified us that he would take these ac-

counts out of our office and place them with Messrs. Fenner & Beane, another firm of brokers. In accordance with the owners' instructions, we were required to terminate our agency and transfer our said accounts to Fenner & Beane as the new substituted brokers. This we did. The cotton [fol. 13] was not sold and no commission was charged by us on the transfer. The same owners who owned the cotton prior to the transaction continued to own it thereafter. There was no change of ownership. There was no buyer involved.

As to the mechanics of making the transfer, we, being members of the New York Cotton Exchange, necessarily complied with that rule of the Cotton Exchange which requires that all transactions, of any kind whatsoever, be put through the Exchange. The Exchange will not recognize a contract for future cotton unless this is done. Furthermore, as a matter of practice, at the end of the month our stamp clerk affixes the appropriate number of stamps on all the transactions going through our office. Of course he has no knowledge that any one particular transaction is of a special nature and is not a usual sale. For that reason he affixed stamps to cover this transaction.

Your deponent avers of his own knowledge that no sale took place, that the transfer was recorded through the Cotton Exchange Clearing Association only because the rules of the Association require all transactions to be thus cleared, irrespective of whether they are bona fide sales or not. Your deponent has read the verified position herein and does of his own knowledge aver that he personally knows each and every allegation therein to be true and repeats and realleges the same as though fully set forth herein and the same are incorporated herein by reference.

John P. Collins.

Sworn to before me this 23 day of Sept., 1935. Lucille Oldacre, Notary Public, N. Y. Cty. Clerk's #31, Reg. #7-O-25. Commission expires Mar. 30, 1937.

[fol. 14] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN L. JULIAN IN SUPPORT OF PETITIONER'S MOTION

STATE OF NEW YORK,
City of New York,
County of New York, ss:

John L. Julian, being duly sworn, deposes and says:

That I am a member of the firm of Fenner & Beane, members of the New York Stock Exchange and the New York Cotton Exchange. That on or about March 23, 1934, we took over by transfer certain accounts from Francis I. DuPont & Company listed in the annexed affidavit of John P. Collins.

In connection with the same there was no sale and the same owners who owned the accounts prior to the transfer continued to own them thereafter. There was merely a change in brokers. The only reason why the transactions were recorded on the purchase and sales sheets was that that is the only mechanics provided for by the New York Cotton Clearing Association for clearing transactions of this nature. There was, however, no sale of the cotton. Ultimately we did sell the cotton for the same principals and we paid the proper taxes and affixed the proper stamps in connection with the transactions.

John L. Julian.

Sworn to before me this 23rd day of Sept., 1935.
John G. Tarrant, Notary Public. N. Y. Co. Clk's #159, Reg. #7T198. Commission expires March March 30, 1937.

[fol. 15] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL AFFIDAVIT OF JOHN P. COLLINS IN SUPPORT OF PETITIONER'S MOTION

STATE OF NEW YORK,
City of New York,
County of New York, ss:

John P. Collins, being duly sworn, deposes and says:

For the purpose of clarifying deponent's affidavit of September 23, 1935, deponent avers that the customers'

instructions to transfer these accounts to Messrs. Fenner & Beane followed our request to the customers to take these accounts out of our house and for that reason no commission was charged in accordance with Section 7 of the Commission Rules of the New York Cotton Exchange.

John P. Collins.

Sworn to before me this 11th day of October, 1935.
Lucille Oldacre, Notary Public, New York County.
Clerk's No. 81, Register's No. 7-O-25. Commission expires March 30, 1937. (Seal.)

[fol. 16] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF FRED F. KUHLMANN IN SUPPORT OF PETITIONER'S MOTION

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Fred F. Kuhlmann, being duly sworn, deposes and says:

That he is the assistant secretary of the New York Cotton Exchange and is thoroughly familiar with the charter, by-laws and rules thereof and also the charter, by-laws and rules of the New York Cotton Exchange Clearing Association, Inc. Under commission rule number 7, when the transfer is made at the request of the house carrying the contracts, no commission or tax is to be charged to a customer for whom the contracts are carried. Although it appears from the signing of purchase and sale contract slips and the filing of the tax return sheets that an additional purchase and sale had been made, such is not the case. It is simply a transfer of outstanding contracts, from the carrying to the receiving broker, and the customer is not penalized by the payment of a commission or revenue tax. If an actual change of ownership took place, the house carrying the contracts would not be permitted to waive its commission. The inclusion of the transaction on the sales and purchase slips is merely for the purpose of preserving the regularity of our records. By the provisions of the by-laws of the New York Cotton Exchange and

[fol. 17] the New York Cotton Exchange Clearing Association, Inc., both the house carrying the contracts and the house receiving the outstanding contracts are required to sign the regular purchase and sales slips so that their respective positions with the Clearing House may be correctly stated as regards the transfer.

Fred F. Kuhlmann.

Sworn to before me this 11 day of October, 1935. Johanna M. Ronner, Notary Public, Kings Co. Kings Co. Clk's No. 410, Reg. No. 7083. N. Y. Co. Clk's No. 197, Reg. No. 7R117. Commission expires March 30, 1937. (Seal.)

In United States District Court

Affidavit of R. St. G. Walker in Support of Petitioner's Motion

State of New York,
County of New York, ss:

R. St. G. Walker, being duly sworn, deposes and says:

I have this day at the request of the Assistant United States Attorney made an affidavit regarding a certain transfer of future cotton contracts between Francis I. DuPont & Company and Fenner & Beane. I am at the same time making this affidavit so that my explanation of the transaction may be exactly clear and subject to no misinterpretation.

[fol. 18] While the transaction referred to was reported on "Sold by" and "Bought by" sheets, that by no means shows that it was necessarily a sale. Every transaction, whether a sale or not, between brokers must be reported on these sheets as they are the only forms we use. Every purchase and sale of cotton for future delivery is recorded on these forms. But, also, every transfer from broker to broker without involving a sale is recorded on the same forms. The names of customers are not reported to us and therefore we cannot tell whether a transaction is an

actual sale or merely a transfer of accounts from one broker to another.

R. St. G. Walker.

Sworn to before me this 10th day of October, 1935. William L. Brown, Notary Public. Queens Cty. Clk's. #176. N. Y. Co. Clerk's #370. Comm. expires Mch. 30, 1936.

[fol. 19] IN UNITED STATES DISTRICT COURT

DEFENDANT'S CROSS NOTICE OF MOTION TO DISMISS

SIRS:

Please take notice that upon the annexed affidavits of Elizabeth Rogers Horan, sworn to October 10, 1935, and R. St. G. Walker, sworn to October 9, 1935, and Fred F. Kuhlmann, sworn to October 10, 1935, and upon the summons and complaint herein, and the answer of the defendant, duly verified August 29, 1935, and upon all the proceedings had herein, a motion will be made in the Motion Part of the United States District Court for the Southern District of New York, to be held in Room 235, United States Courts & Post Office Building, Borough of Manhattan, City of New York, on the same day upon which the plaintiff's motion for a summary judgment, brought on by notice of motion served on defendant September 27, 1935, is to be heard, and at the same time, for an order dismissing the complaint and granting summary judgment in favor of the defendant and against the plaintiffs, and for such other and further relief as may be just and proper.

F. W. H. Adams, United States Attorney for the Southern District of New York.

To Irving Mariash, Esq., Attorney for Plaintiffs, 29 Broadway, N. Y. C.

[fol. 20] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF ELIZABETH ROGERS HORAN IN OPPOSITION TO PETITIONERS' MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-NOTICE OF MOTION.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Elizabeth Rogers Horan, being duly sworn, deposes and says:

She is an Assistant United States Attorney for the Southern District of New York and as such is in charge of and familiar with the above entitled action.

The reason why this affidavit is made by deponent and not by the defendant is that defendant is a sovereign body politic.

In answer to the affidavits attached to the plaintiffs' notice of motion for summary judgment filed herein, and in opposition to the said motion, and, further, in support of defendant's motion for judgment, your deponent alleges upon information and belief as follows:

This action was commenced by the filing of a præcipe and the issuance of a summons and complaint on January 10, 1935; an answer was served by the defendant on August 30, 1935, within the time for such service, as extended, and filed August 31, 1935; and the plaintiffs have made a motion for summary judgment, setting forth certain facts by affidavits annexed to the notice of motion, and stating that [fol. 21] there is no question of fact involved, and that judgment should be granted in favor of the plaintiffs.

Your deponent believes that the only material question of fact in this case not admitted in the answer to the complaint, and not substantiated by the affidavits attached to plaintiff's motion for summary judgment, is the allegation in paragraph 7 of the complaint, which is denied in part in paragraph 4 of the answer, and stated by the defendant in said paragraph 4 of the answer to be as follows: "On or about March 23, 1934, in accordance with the rules and usages of the New York Cotton Exchange, and the New York Cotton Exchange Clearing Association, plaintiffs undertook to and did sell and transfer the aforesaid 24,100 bales of cotton to Messrs. Fenner & Beane, brokers and

members of the New York Cotton Exchange, and that said transaction was cleared through the New York Cotton Exchange, rules and usages, as a sale, and the plaintiffs and the said Fenner & Beane duly executed the usual form of sale and memorandum and recorded and reported the transaction as a sale, subject to payment of the documentary stamp tax under the provisions of Schedule A-4, Title VIII of the Revenue Act of 1926."

The said allegation in paragraph 4 of the answer is substantiated by the affidavit of R. St. G. Walker, annexed hereto, and by the Exhibits 1, 2, and 3 annexed to and made a part of said affidavit, and by the affidavit of Fred F. Kuhlmann, annexed hereto.

Your deponent believes that this action has no merit.

The sources of deponent's information and the grounds of her belief are documents and official communications [fol. 22] from the Attorney General of the United States, and the records and rules of the New York Cotton Exchange and the New York Cotton Exchange Clearing Association, which have been inspected by her.

Wherefore, your deponent respectfully prays that the complaint herein be dismissed, and judgment awarded to the defendant, and for such other and further relief as may be just and proper.

Elizabeth Rogers Horan.

Sworn to before me this 10th day of October, 1935.
Armand Chankalian, Notary Public, New York Co.
Clerk's No. 343, Reg. No. 7C494. Commission expires March 30, 1937.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF R. ST. G. WALKER IN OPPOSITION TO PETITIONERS' MOTION AND IN SUPPORT OF DEFENDANT'S MOTION

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

R. St. G. Walker, being duly sworn, deposes and says:

That he is Secretary and Treasurer of the New York Cotton Exchange Clearing Association, Inc., 60 Beaver Street, New York, N. Y.

That he has held such position since July, 1915, and is familiar with the rules and usages of the said Association. [fol. 23] That he is in charge of the records on file in the office of the said Association, and has examined said records and found among them the records of certain transactions made on March 23, 1934, between Francis I. DuPont & Co. and Fenner and Beane, hereinafter described, which records include data relating to the following contracts of cotton for future delivery:

Francis I. DuPont & Co.

Sold			Bought		
30	May	Contracts @ 1187			
15	July	" 1199			
119	Oct.	" 1211	1	Oct.	Contract @ 1211
76	Dec.	" 1221			
240	(Tax paid $729.40)				

That the said contracts for future delivery were recorded with the New York Cotton Exchange Clearing Association, Inc., on March 23, 1934, by Francis I. DuPont & Co. as having been "Sold by" Francis I. DuPont & Co. on that date to Fenner & Beane, on a form exactly like the blank form annexed hereto and made a part hereof and marked Exhibit 1.

That the said contracts for future delivery were likewise recorded with the said Association on March 23, 1934, by Fenner & Beane as having been "Bought by" Fenner and Beane from Francis I. DuPont & Co. on the said date on a form exactly like the blank form annexed hereto and made a part hereof and marked Exhibit 2.

That on April 4, 1934, the said Francis I. DuPont & Co. filed with the New York Cotton Exchange Clearing Association, Inc., a "Monthly Stamp Tax Memorandum," to which the requisite revenue stamps were affixed, which in- [fol. 24] cluded the transactions relating to the aforesaid contracts which were listed as having been sold by Francis I. DuPont & Co. to Fenner & Beane on March 23, 1934, on a form exactly like the form annexed hereto and made a part hereof and marked Exhibit 3.

That an oral request was made on March 23, 1934, to the Clearing Association by Francis I. DuPont & Co. to exempt

these entries from paying a tax on sales because it was stated by Francis I. DuPont & Co. that the transactions represented a change of brokers and not of principals, and no actual sale was then made, and that when an actual sale was made by the principal, the tax would be paid in due course by Fenner & Beane, the apparent buyer in this transaction.

As there was no precedent under the customary usages of the Clearing Association to comply with such a request, no written request to that effect was made by Francis I. DuPont & Co., and the oral request was not granted.

That under the usages of the New York Cotton Exchange Clearing Association, Inc., in March and April, 1934, and for many years prior thereto, every purchase and sale of cotton for future delivery from one member to another was recorded for clearance by the Association on forms like those annexed hereto, and marked Exhibits 1, 2 and 3.

R. St. G. Walker.

Sworn to before me this 9th day of October, 1935. August Wills, Notary Public, Queens County. Co. Clerk's No. 1769, Reg. No. 5088. Certificate filed in New York Co. Co. Clerk's No. 583, Reg. No. 7W97. Commission expires March 30, 1937. (Seal.)

[fol. 25] EXHIBIT 1 ANNEXED TO AFFIDAVIT OF R. ST. G. WALKER

New York, ... 19

Sold by .....

and contracts offered to New York Cotton Exchange Clearing Association, Inc. for clearance in accordance with its By-Laws and Rules.

To Whom Sold						
Number	No. Bales (00 omitted)	Month	Price	Settling Price	Debit Points	Credit Points
Totals						

Bale and Point Totals Forward

EXHIBIT 2 ANNEXED TO AFFIDAVIT OF R. ST. G. WALKER

New York, ... 19

Bought by .....

and contracts offered to New York Cotton Exchange Clearing Association, Inc. for clearance in accordance with its By-Laws and Rules.

From Whom Bought						
Number	No. Bales (00 omitted)	Month	Price	Settling Price	Debit Points	Credit Points
Totals						

Bale and Point Totals Forward

[fol. 26] EXHIBIT 3 ANNEXED TO AFFIDAVIT OF R. ST. G. WALKER

Monthly
Stamp Tax Memorandum

of .....

to the

New York Cotton Exchange Clearing Ass'n, Inc.

(Recapitulation of Daily Statements of Past Month)

New York, ... 193..

Day of Month	Total Value	Stamp Tax	Stamps
1 to 31			
Total			

Use Stamps of Large Denomination

To be filled in by the Clearing Association

Tax Checked by ..... Audited by .....
Footed ..... Stamps $ ..... By .....

[fol. 27] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF FRED F. KUHLMANN IN OPPOSITION TO PETITIONERS' MOTION AND IN SUPPORT OF DEFENDANT'S MOTION

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

I, Fred F. Kuhlmann, being duly sworn, depose and say:

I am Assistant Secretary of the New York Cotton Exchange, located at 60 Beaver Street, New York City.

I have held that position since about 1918, and am familiar with and have custody of the Charter, By-Laws and Rules of the New York Cotton Exchange.

The Commission Law Rules of the New York Cotton Exchange are made by the Committee on Commissions pursuant to its authority under Section 25 of the By-Laws, and are approved by the Board of Managers and have the same force and effect as By-Laws.

The following sections are sections of the said Charter, By-Laws and Rules of the New York Cotton Exchange, and were in full force and effect on March 23, 1934:

1. Section 33 of the By-Laws of the New York Cotton Exchange:

"Contract for Future Delivery

Sec. 33. No contract for the future delivery of cotton shall be recognized, acknowledged, or enforced by the Exchange, or any Committee or Officer thereof, unless both parties thereto shall be members of the New York Cotton Exchange, provided, however, that members shall offer their [fol. 28] contracts for clearance to the New York Cotton Exchange Clearing Association, Inc., which shall become by substitution a party thereto in place of a member, and thereupon such Association shall become subject to the obligations thereof and entitled to all the rights and privileges of a member in holding, fulfilling or disposing thereof.

All contracts for the future delivery of cotton shall be in the following form:

New York Cotton Exchange

Contract

New York ..... 1 ....

A. B. of the County and State of New York have this day sold/bought and agreed to deliver to/receive from C. D. of the same place, 50,000 pounds in about 100 square bales of Cotton, growth of the United States, at the price of ..... cents per pound for Middling, with additions or deductions for other grades in accordance with the provisions of the United States Cotton Futures Act, Section 6, and allowance for staple premium, deliverable from licensed warehouse in ..... between the first and last
(Point of Delivery)
delivery days of ..... inclusive, the delivery within such time to be at seller's option in one warehouse, upon notice to buyer, as provided by the By-Laws and Rules of the New York Cotton Exchange. The Cotton dealt with herein or delivered hereunder shall be of, or within, the grades for [fol. 29] which standards are established by the Secretary of Agriculture, except cotton prohibited from being delivered on a contract by the fifth sub-division of Section 5 of the United States Cotton Futures Act, and shall be of no other grade or grades, and shall be subject to New York Cotton Exchange inspection.

Either party may call for a margin, as the variations of the market or like deliveries may warrant, which margin shall be kept good.

This contract is made in view of, and in all respects subject to the regulations made pursuant to said United States Cotton Futures Act and to the By-Laws and Rules of the New York Cotton Exchange not in conflict with said Act or said regulations.

Subject to United States Cotton Futures Act, Section five.

Verbal contracts (which shall always be presumed to have been made in the foregoing form) shall have the same standing, force, and effect as written ones, if notice in writing of such contracts shall have been given by one of the parties thereto to the other party during the day on which such contract is made, or on the next business day thereafter.

Delivery of cotton on contract may be made at delivery points designated by the Board of Managers in addition to New York. The designated delivery points may be added to or subtracted from at the discretion of the Board of Managers after proper notice has been given to the membership."

[fol. 30] 2. Section 34 of the By-Laws of the New York Cotton Exchange:

"Contract Slips

Sec. 34. Each seller and buyer of cotton for future delivery shall on the day upon which the transaction takes place, sign a contract or slip therefor and deliver the same to the other party to the transaction.

All contracts or slips shall be signed by members themselves or by their firms, or by attorneys having requisite authority under these By-Laws.

A member or his firm may give power of attorney authorizing signature of his or the firm's name to contracts or slips, which power shall be duly executed in such form as may be prescribed by the Board of Managers, and shall be valid and binding upon said member or his firm until formally revoked.

All contracts or slips shall be signed with the full name of the member or his firm, and when signed by attorney, his name shall be written in full and as attorney.

All powers given shall be filed with and retained by the Secretary, and the person to whom the power is given shall attach his signature to it.

All powers given shall be announced from the rostrum by the Secretary at the close of the Exchange on the day the power is executed and posted on the bulletin for five days thereafter. The same procedure shall apply to the revocation of any power.

[fol. 31] All slips shall be in form as follows:

New York, ...

Sold to

.....

of New York, N. Y.

And agree to deliver to them subject to the By-Laws and Rules of New York Cotton Exchange and subject to United States Cotton Futures Act, Section Five.

Bales Cotton	Delivery	At Cents Per Pound For Middling

.....of New York, N. Y.

New York, ...

Bought of

.....

of New York, N. Y.

And agree to receive from them subject to the By-Laws and Rules of New York Cotton Exchange and subject to United States Cotton Futures Act, Section Five.

Bales Cotton	Delivery	At Cents Per Pound For Middling

.....of New York, N. Y.

[fol. 32] 3. Rule 27 of the New York Cotton Exchange:

"Revenue Stamps

Rule 27. Every member of the Exchange who shall make a contract of purchase or sale of cotton for future delivery

shall appoint, by proper power of attorney, The New York Cotton Exchange Clearing Association, Inc., his agent for the purpose of receiving and preserving for a period of four years the returns or memoranda described below.

As long as the Revenue Act of 1918 shall continue in force, it shall be the duty of every member of the Exchange who makes a contract of sale of cotton for future delivery, to deliver, within the time required by law, to said New York Cotton Exchange Clearing Association, Inc., such return or stamped memorandum thereof as may be required by law."

4. Section 7 of the Commission Law Rules of the New York Cotton Exchange:

"Transfer of Contracts

7. When a transfer of contracts already outstanding for the account of a customer is requested by the customer the full commission for both buying and selling must be charged, both by the house which originally purchased or sold the contracts, and the house to which the transfer is made. When the transfer is made at the request of the house carrying the contract or contracts the question of a commission involved shall be a matter of arrangement between the house making the request and the house assuming the con- [fol. 33] tracts, but in no event shall the customer be required to pay more than the regular rate of commission which would have been charged had no transfer been requested."

I am familiar with the following sections of the Charter, By-Laws, and Rules of the New York Cotton Exchange Clearing Association, Inc., and have copies of them in my possession, and know that they were in full force and effect on March 23, 1934:

1. Section 11 of the By-Laws of the New York Cotton Exchange Clearing Association, Inc.:

"Method of Clearance

Sec. 11. The Association may accept contracts offered to it by Clearing Members for clearance, and by such acceptance shall, in place of either party to a contract so accepted and toward the other party thereto, assume the obilgations

imposed thereby and succeed to and become vested with all the rights and benefits accruing therefrom, assuming to the buyer the position of seller and to the seller the position of buyer, as the case may be. As between the Association and each of the parties to an accepted contract, the terms and conditions thereof shall continue in full force and effect.

Each Clearing Member shall make daily reports to the Association of all contracts for future delivery of cotton made by such member on the New York Cotton Exchange with other Clearing Members in accordance with rules and regulations prescribed by the Directors.

Each report shall be accompanied by a check to the order of the Association, or draft upon it, for the amount neces- [fol. 34] sary, after allowing for amounts theretofore paid on account, to mark outstanding contracts with the Association, together with all other contracts set forth in the report to the last settlement prices posted by the Association, which shall be based on the closing bid prices on the New York Cotton Exchange for cotton deliverable in the months mentioned in such contracts, respectively. (Marking a contract to the last settlement price is the payment or receipt of the difference between the value of the contract at the contract price, and at the closing settlement price.) There shall also be attached to and be delivered with such report a check for any original margin that may be required, as prescribed in Sections 14 and 17. When trading in the current month has ceased, differences on outstanding contracts shall be settled as provided in Rule V.

All contracts reported to the Association as above provided shall be deemed accepted by it, unless the parties thereto are notified in writing to the contrary by the Association on or before 11 A. M. on the business day following that on which the contracts are made, up to which time the Association has the right to refuse to accept any contract reported to it as aforesaid."

2. Rule II of the New York Cotton Exchange Clearing Association, Inc.:

"II. No contracts shall be entered by members on their daily reports to the Association unless contracts or slips have been previously signed by both parties in accordance with the By-Laws of the New York Cotton Exchange."

[fol. 35] 3. Rule VII of the New York Cotton Exchange Clearing Association, Inc.:

"VII. On the last day upon which trading is permitted in cotton for delivery during any month, all transactions made in the current month shall be reported immediately by the seller to the Clearing Association, stating name of firm with whom the transaction is made."

Fred F. Kuhlmann.

Sworn to before me this 10 day of Oct., 1935. Johanna R. Ronner, Notary Public, Kings Co. Kings Co. Clk's No. 410, Reg. No. 7083. N. Y. Co. Clk's No. 197, Reg. No. 7R117. Commission expires Mar. 30, 1937. (Seal.)

In United States District Court, Southern District of New York

Irvin Mariash, Attorney for Plaintiffs, by Irving Mariash, I. Maurice Wormser, of Counsel.

F. W. H. Adams, United States Attorney, by Elizabeth Rogers Horan, Assistant United States Attorney.

Opinion

Goddard, District Judge:

The action is for refund of stamp tax in the sum of $729.40. The plaintiffs have moved for summary judgment [fol. 36] to recover the sum involved, and the defendant has moved for summary judgment dismissing the complaint.

The facts are undisputed. The plaintiffs are members of the New York Cotton Exchange. On March 23, 1934, they held for the account of a certain customer 24,100 bales of cotton for future delivery. They requested the customer to remove the account and were accordingly instructed by the customer to transfer the account to Fenner & Beane, also members of the Cotton Exchange. To effect the transfer, the plaintiffs made out a sales slip in the form regularly used by members, showing the sale to Fenner & Beane of the cotton, and Fenner & Beane gave a similar

purchase slip to the plaintiffs. Actually there was no sale, for the customer was the owner of the cotton before and after the transaction. There was merely a change of brokers, but under the usage of the Cotton Exchange all transfers from one member to another were evidenced by the exchange of sale slips and purchase slips as in this case. The plaintiffs paid the stamp tax through mistake, so they say, and sue to recover. The case then is one where a memorandum of sale of the cotton was made and delivered, as called for by custom of the Exchange but where in fact there was no sale.

I am of opinion that payment of the stamp tax was required in this case, and that no refund should be made.

The tax is imposed "for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this title, or for in respect of the vellum, parchment, or paper upon which [fol. 37] such instruments, matters, or things, or any of them, are printed or written." Revenue Act of 1926, §800, 26 U. S. C. A., §900. Under Schedule A, paragraph 4, the tax is "upon each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales), any products or merchandise at, or under the rules or usages of, any exchange, or board of trade, or other similar place, for future delivery * * *: Provided, that on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale."

In determining the liability to stamp duty, regard is paid to the form and face of an instrument, rather than to the transaction of which it forms a part. United States v. Isham, 17 Wall. 496; Merchants Warehouse Co. v. McClain, 112 Fed. 787, affirmed 115 Fed. 295. Here the sales slip on its face showed a sale in ordinary course under the rules of the Exchange, upon which the tax is levied. It does not matter that by looking at facts outside the instrument we may perceive that actually there was no sale, but simply a change of brokers.

The motion by the defendant for summary judgment dismissing the complaint will be granted, and the plaintiffs' motion denied.

December 31, 1935.

Henry W. Goddard, U. S. D. J.

[fol. 38] In United States District Court

Order Dismissing Complaint—January 6, 1936

The plaintiffs having made a motion upon the complaint and answer and the affidavits filed herein, and on all the proceedings had herein, for an order striking out the said answer and directing that judgment for the amount demanded in the complaint be entered in favor of the plaintiffs and against the defendant; and the defendant having made a cross-motion upon the complaint and answer and the affidavits filed herein, and upon all the proceedings had herein, for an order dismissing the complaint and granting summary judgment in favor of the defendant and against the plaintiffs, and the said motions having regularly come on to be heard on October 15, 1935, and the plaintiffs, by Irving Mariash, their counsel, having appeared in support of the plaintiffs' motion, in opposition to the defendant's motion; and the defendant, by F. W. H. Adams, then United States Attorney for the Southern District of New York, by Elizabeth Rogers Horan, Assistant United States Attorney, having appeared in support of the defendant's motion, and in opposition to the plaintiffs' motion; and the Court, by the Honorable Henry W. Goddard, United States Dis-
[fol. 39] trict Judge, having rendered a decision thereon on December 31, 1935, denying the motion of the plaintiffs and granting the motion of the defendant;

Now, upon reading and filing the said notices of motions, and upon all the proceedings had herein, and upon motion of Lamar Hardy, United States Attorney for the Southern District of New York, it is

Ordered that the plaintiffs' motion be and the same hereby is in all respects denied, and it is

Further Ordered that the defendant's motion be and the same hereby is in all respects granted, and it is

Further ordered that the Clerk of this Court enter judgment in favor of the defendant and against the plaintiffs dismissing the complaint, and it is

Further Ordered that the costs and disbursements of this action shall be awarded to the defendant.

Henry W. Goddard, U. S. D. J.

[fol. 40] In United States District Court, Southern District of New York

Judgment

The plaintiffs having moved for judgment, and the defendant having made a cross-motion for a judgment, and an order of this Court having been duly made denying the plaintiffs' motion and directing the entry of judgment as hereinafter provided, and the costs having been duly taxed in the sum of $20.00 by the Clerk of this Court,

Now, on motion of Lamar Hardy, United States Attorney for the Southern District of New York, attorney for the defendant, it is

Ordered and adjudged that the complaint filed herein is dismissed, and that the defendant recover of the plaintiffs thes um of $20.00 costs, and that the defendant have execution therefor.

Dated, New York, N. Y., this 16th day of January, 1936.

Charles Weiser, Clerk.

[fol. 41] In United States District Court

[Title omitted]

Notice of Appeal

Sir:

Please take notice that the plaintiffs, Francis I. DuPont, Edmund DuPont, Rhett DuPont, E. Paul DuPont, William A. Fine, Arthur F. Shettle, William A. Whitaker, co-partners, trading under the firm name and style of Francis I. DuPont & Company, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the

order entered herein on January 7, 1936, and from the judgment entered herein on January 16, 1936, dismissing plaintiffs' complaint with costs against plaintiffs in the sum of [fol. 42] $20.00; and from each and every part of said order and judgment, as well as from the whole thereof.

Dated New York, January 21, 1936.

Irving Mariash, Attorney for Plaintiffs, Office and P. O. Address, 29 Broadway, Borough of Manhattan, City of New York.

To Lamar Hardy, Esq., United States Attorney, Southern District of New York, Attorney for Defendant, U. S. Courts & P. O. Building, New York City.

[fol. 43] IN UNITED STATES DISTRICT COURT

PETITION FOR LEAVE TO APPEAL

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Francis I. DuPont, Edmund DuPont, Rhett DuPont, E. Paul DuPoint, William A. Fine, Arthur F. Shettle, William A. Whitaker, co-partners, trading under the firm name and style of Francis I. DuPont & Company, plaintiffs herein, considering themselves aggrieved by certain errors which were committed in the proceedings heretofore had herein to the prejudice of said plaintiffs, as set forth in detail in the assignments of error which are filed with this petition, and by the order entered herein on January 7, 1936, and the judgment entered herein on January 16, 1936, dismissing plaintiffs' petition for a refund of taxes with costs against the plaintiffs, hereby pray that an appeal be allowed from said order and judgment and from each and every part thereof to the United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of and for the reversal of said order and judgment, and that a transcript of the record, papers and proceedings in this case, duly authenticated by the Clerk of this Court, may be sent to the Circuit Court of Appeals and that a citation addressed to the defendant herein be issued as directed by law.

Dated, New York, January 21, 1936.

Francis I. DuPont, One of the Plaintiffs.

[fol. 44] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—January 22, 1936

On reading and filing the petition of the plaintiffs for allowance of an appeal herein and the notice of appeal and assignment of error, and on the motion of Irving Mariash, Esq., attorney for plaintiffs, it is

Ordered that said appeal be, and the same hereby is allowed; and it is further

Ordered that a citation addressed to the defendant herein be issued according to law; and it is further

Ordered that a transcript of the record, papers and proceedings herein, duly authenticated by the Clerk of this Court, be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Alfred C. Coxe, U. S. D. J.

[fol. 45] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS

Now come the plaintiffs, Francis I. DuPont, Edmund DuPont, E. Paul DuPont, William A. Fine, Arthur F. Shettle, William A. Whitaker, copartners, trading under the firm name and style of Francis I. DuPont & Company, by their attorney, Irving Mariash, Esq., and in connection with their petition for the allowance of the appeal herein, say that in the record of the proceedings and in the final judgment in the above entitled cause manifest errors were committed to the prejudice of the plaintiffs in that the District Judge erred:

1. In denying plaintiffs' motion for summary judgment for the amount demanded in the petition.

2. In granting defendant's motion for summary judgment dismissing the petition, with costs.

Wherefore, the plaintiffs pray that for the errors aforesaid the judgment and order of the United States District Court of the Southern District of New York be reversed.

Dated, New York, January 21, 1936.

Irving Mariash, Attorney for Plaintiffs, Office and P. O. Address, 29 Broadway, Borough of Manhattan, City of New York.

[fol. 46] Citation, in usual form, omitted in printing.

[fol. 47] In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing printed transcript of record contains all of the proceedings herein as agreed upon between the parties hereto.

Dated, New York, February 17, 1936.

Irving Mariash, Attorney for Petitioners-Appellants.

Lamar Hardy, United States Attorney, Attorney for Defendant-Appellee.

[fol. 48] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued April 22, 1936. Decided June 1, 1936

No. 356

FRANCIS I. DUPONT, EDMUND DUPONT, RHETT DUPONT, E. Paul Dupont, William A. Fine, Arthur F. Shettle, and William A. Whitaker, Copartners, Trading under the Firm Name and Style of Francis I. Dupont & Company, Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Chase, Circuit Judges

Action against the United States to obtain refund of stamp taxes. From an order granting the defendant's motion for summary judgment, and from the judgment entered thereon, the plaintiff appeal. Affirmed.

Irving Mariash, of New York City (I. Maurice Wormser, of New York City, on the brief), for appellants.

Lamar Hardy, U. S. Atty., of New York City (Edward J. Ennis, Asst. U. S. Atty., and Helen E. Cottrell, Sp. Asst. U. S. Atty., both of New York City, of counsel), for the United States.

SWAN, Circuit Judge:

The plaintiffs are a firm of cotton brokers who trade on the New York Cotton Exchange. On behalf of certain customers they had purchased 24,000 bales of cotton for future delivery. On March 23, 1934, they were instructed by these customers to transfer their accounts to another firm of brokers. The plaintiffs carried out these instructions by delivering a "sold" memorandum to the other broker, who in turn delivered a "bought" memorandum to the plaintiffs. No commission was charged the plaintiffs' customers because their instructions to remove the accounts had been

given at the plaintiffs' request. The documents exchanged were in the form invariably used in every purchase and sale of cotton for future delivery between members of the Exchange. Upon this transaction the plaintiffs paid stamp taxes of $729.40, for which they immediately filed a claim for refund. The commissioner of Internal Revenue rejected it, and this action followed:

By the statute (Revenue Act 1926, § 800, Schedule A(4), 44 Stat. 99, 101, 102), a stamp tax is imposed upon "each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales) * * * at, or under the rules or usages of, any exchange * * * for future delivery." The plaintiffs contend: (1) That the statute contemplates a document evidencing a "real sale" and not a mere change of brokers for the same customer; and (2) that the transaction in question is expressly excepted as a "transferred or scratch sale." Rejecting these contentions, the District Court held the transaction taxable, and upon the pleadings and supporting affidavits gave summary judgment dismissing the complaint.

Although the purpose of the transaction was to transfer [fol. 50] a customer's account from one brokerage firm to another, the mechanics of doing this involved a contract of sale for future delivery made by the plaintiffs with the substitute broker. Ordinarily, it is true, one who acts as an agent does not become personally bound on a contract which he makes for a disclosed principal; but if he fails to divulge the name of his principal, he does become a party to the contract. American Law Inst. Restatement of Agency, §§ 320-322. When a broker deals in futures on the New York Cotton Exchange, he is personally liable as principal, whether or not he discloses the identity of his customer, for section 33 of the by-laws of the Exchange provides that no contract for future delivery shall be recognized or enforced by the Exchange "unless both parties thereto shall be members of the New York Cotton Exchange." It also specifies the form of contract to be used. This by-law is intended to, and does, force the brokers to assume the obligations of principals to each other. See Wilhite v. Houston, 200 F. 390, 392 (C. C. A. 8); Mullinix v. Hubbard, 6 F. (2d) 109, 110 (C. C. A. 8); American Cotton Mills v. Monier, 61 F. (2d) 852, 854 (C. C. A. 4). Nor is the broker's liability as a principal on his contracts

to buy or sell in any wise affected by his right to recover indemnity from his customer as in the cases last cited. See, also, Whitehead v. Izod, L. R. 2 C. P. 228; Ulster County Sav. Inst. v. Fourth Nat. Bank, 54 Hun. 638, 8 N. Y. S. 162, 165, 166. The contention that the broker has merely the status of a del credere agent is wholly groundless. Such an agent guarantees to the principal performance of the purchaser's contract. See American Law Inst. Restatement of Agency, § 424d. In case of a broker, the reverse is true; that is, the right of indemnity runs from the principal to the agent. If the facts at bar be analyzed with the foregoing principles in mind, it is apparent that what happened was this: The plaintiffs had incurred personal liability on contracts to purchase cotton to be delivered in the future; when instructed to "transfer" the accounts to another broker, they made a contract with the substituted broker to sell an equal amount of cotton to him. The result was not to release the plaintiffs from their original contracts to buy; no one could do that but the original sellers; and there was no novation, for the new broker assumed no contract relations with them. Hence the plaintiffs still remained obligated to receive delivery from the original sellers but had protected themselves in respect to this liability by obtaining the obligation of the substituted broker to receive delivery of a like amount of cotton from them. Protection of this character could be had only by making a sale to the new broker; it was obviously a sale in substance as well as in form. Statements to the contrary in the affidavits are merely expressions of opinion by the affiants and are erroneous conclusions of law. Arguendo the plaintiff's contention that the statute taxes only instruments evidencing an actual transaction may be admitted. But the result of reversal does not follow, for the plaintiffs' agreement to sell to the substituted broker was an actual transaction. To call it a transfer of the plaintiffs' contracts to buy is a misnomer resulting from an inaccurate analysis of the legal relations as above explained. No contract to buy was assigned; no title to specific cotton was transferred, and the new broker's contract did not require delivery by the plaintiffs of the same cotton they had contracted to accept from the original sellers, any other cotton of the specified description would satisfy the contract as well. The conclusion must be that the plaintiffs made an agreement to sell to the new

broker upon which they must pay a stamp tax unless it comes within the statutory exception of "so-called transferred or scratch sales."

This phrase has been defined in articles 44(a) and 125(3)(c) of Treasury Regulations 71. The definition requires that the purchase and sale be made at the same exchange, on the same day, at the same price, and for the account of the same person. The plaintiffs' sale to the substituted broker was made on March 23, 1934; the purchases for the plaintiffs' customers had been made prior to that date. Since the purchases and sales were not made on the same day, the transaction in question was not within the exception.

The judgment is affirmed.

[fol. 51] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 8th day of June, one thousand nine hundred and thirty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

FRANCIS I. DUPONT et al, as Co-Partners, etc., Plaintiffs-Appellants,

vs.

UNITED STATES, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 52] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Francis I. DuPont et al. vs. United States. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed June 8, 1936. William Parkin, Clerk.

[fol. 53] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 52, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Francis I. DuPont, et al., etc., Plaintiff-Appellants, against United States of America, Defendant-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 4th day of August, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk, by D. E. Roberts, Deputy Clerk.
(Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,872. U. S. Circuit Court of Appeals, Second Circuit. Term No. 332. Francis I. DuPont, Edmund DuPont, Rhett DuPoint, et al., etc., petitioners, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed September 1, 1936. Term No. 332, O. T. 1936.